

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 1088 of 1996

For Approval and Signature:

Hon'ble THE CHIEF JUSTICE G.D.KAMAT

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BHIKHABHAI S/O HIRABHAI

DAHAYABHAI

Versus

RATHOD DAHYABHAI JETHABHAI

Appearance:

Mr. Qureshi, Advocate, with MR RC JANI for Petitioners

MR PRADYUMAN B BHATT for Respondent No. 1

MR PK JANI for Respondent No. 2

SERVED for Respondent No. 3, 4

CORAM : THE CHIEF JUSTICE G.D.KAMAT

Date of decision: 06/12/96

ORAL JUDGEMENT

Rule. To be heard forthwith.

This revision application is directed against the order dated 29th June, 1996, whereby Miscellaneous Civil Application No.35 of 1996 has been rejected by the Joint District Judge at Mehsana. The Miscellaneous Civil Application had prayed for restoration of Regular Civil Appeal No.101 of 1995, which was dismissed for default on 29th of February, 1996. The petitioners had instituted suit for a declaration and certain other reliefs against the respondents in the Court of Civil Judge (Junior Division), Kadi. The suit was eventually dismissed, with the result the petitioners instituted the aforementioned appeal. The appeal was adjourned from time to time and on 17th of January, 1996, it was adjourned to 29.2.1996, although according to the Court, it had been adjourned to 28.2.1996. On finding that the petitioners were not present nor represented by the Advocate, appeal was dismissed for default on 28.2.1996. The petitioners

applied for certified copy of the order and instituted Miscellaneous Civil Application for restoration on 3rd of April, 1996, but the learned appellate court rejected the same on 29.6.1996 on the ground that the application for restoration is barred by six days and no sufficient cause has been made out.

It is difficult to accept the impugned order. What is, however, required to be seen is that the petitioners have set out in the application that the petitioners instituted another appeal and that appeal was listed for hearing on 29.2.1996 before the appellate court, presided over by Judge Tank. The petitioners were under a misapprehension that his Regular Civil Appeal No.105 of 1995 was also listed on 29.2.1996 and that is how, he was not present before the Court on that day. The fact that the appellant was prosecuting another appeal before another Court is not disputed. In this view of the matter, the learned appellate court ought to have considered that there could have been a genuine error on the part of the petitioners with regard to the date.

The next question to be considered is whether the application could have been dismissed on the ground that it was belated. In any event, according to the petitioners, they came to know about the disposal of the appeal on 29th of February, 1996 and they instituted the application for restoration on 3rd of April, 1996. Indeed, they obtained a certified copy of the order of dismissal dated 28th February, 1996, which had taken some time. In any event, even considering that the appellate court is right, the delay was hardly six days. It is, therefore, clear that the petitioners were not negligent in prosecuting their appeal or seeking its restoration. Ordinarily, the matters cannot be defeated on technicalities and parties should be allowed to fight their cases on merits. In any event, the learned Judge could have awarded costs and allowed the restoration application. Since he did not do that, this Court is perforced to interfere with the impugned order. Accordingly, the order dated 29.6.1996 in Miscellaneous Civil Application No.35 of 1996 is set aside. The said application is allowed, on payment of costs of Rs.250/- to the respondents, which shall be paid within one month from today and accordingly, upon payment, Regular Civil Appeal No.101 of 1995 stands restored, which the learned appellate court shall dispose of on its merits. Rule is accordingly made absolute.

(apj)